



REPUBLIC OF KEYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 606 OF 2011

HAREE CONSTRUCTION CO. LTD APPELLANT

VERSUS

REGINA NDUKU MULI RESPONDENT

(An appeal from the Judgment and Decree of Hon. P. Nditika (Mr). Senior Resident Magistrate in Milimani No. 3748 of 2006 dated 15th November, 2011)

JUDGMENT

This is an appeal arising from the judgment of the lower court where the respondent was the plaintiff while the appellant was the defendant. The respondent was injured in a road traffic accident and blamed the driver of the appellant for causing that accident.

Following the hearing conducted in the lower court, the driver of the defendant was found to be a100% liable for the injuries sustained by the plaintiff.

The responded was awarded Kshs. 650,000/= general damages and Kshs. 3,650/= special damages plus costs and interest. The appellant was aggrieved by the said judgment and filed this appeal. In the memorandum of appeal the respondent contended that the trial magistrate erred in law and in fact that the defendant was 100% liable for the accident. It was also contended that the trial magistrate failed to find that both parties were equally to blame yet there was sufficient evidence to so find.

The learned trial magistrate was also faulted for not considering that the respondent substantially and or wholly contributed to the accident, and as a result arrived at an erroneous finding on liability. The award in general damages was said to be manifestly excessive considering the injuries sustained by the respondent. In that regard, the trial magistrate is faulted for not properly considering the medical reports as a result of which a wrong assessment of damages was made.

Finally it is contended that the defendants submissions were not considered as a result of which there was an erroneous finding on liability and quantum. On the foregoing grounds, there is a prayer that the appeal is allowed both on liability and quantum.

Both learned counsel have filed submissions addressing the appeal. As the first appellate court, it is my duty to go through the entire record of the lower court and arrive at independent conclusions. Only the respondent gave evidence in support of her case while the appellant's driver is the only witness who gave evidence for the defence.

In the amended plaint filed on 8th January, 2008, the plaintiff stated that she was lawfully and carefully

walking besides Nairobi Thika highway near Utalii hotel, when motor vehicle registration Number KAQ 162U was negligently driven that it veered off the road and knocked her down. This was denied by the defendant who in the defence stated that it was the plaintiff to blame as she stepped into a busy road when she knew or ought to have known it was unsafe to do so. She was also accused of not keeping any proper look out and had no regard for her own safety. She was also accused of dashing onto to the path of the defendant's motor vehicle without giving the driver any or reasonable opportunity to avoid the collision. Further she failed to see the defendant's motor vehicle to avoid the accident and her manner of walking was erratic and haphazard.

In her evidence in the lower court the respondent told the court that she was walking beside the road other left side when she was hit by the motor vehicle which was behind her. Under cross examination, she said there was traffic jam and was hit by the side of the motor vehicle.

The defendants' driver on the other hand said while he was driving along Thika road at Utalii, he saw a lady through a side mirror who was hit by the side of the motor vehicle. He denied that he veered off the road. It is clear that with only the two witnesses testifying, it was the word of one against the other.

In his judgment the learned trial magistrate said as follows,

“The issue is who is to blame for the accident. The plaintiff sustained a fracture. If it is true that the defendant was driving at a low speed would such injuries have resulted? The answer is no. It was in the morning at 6. I take judicial notice of the fact that at 6 o'clock there is no traffic jam. The defendant must have been driving at a high speed. I therefore hold the defendant 100% liable.”

The time given by the defendant's driver is 7 o'clock but the learned trial magistrate has said in his judgment that it was 6 o'clock. Whatever the case, if it true the defendant dashed onto the road and the path of the defendant's motor vehicle, she would have been knocked by the front side of the motor vehicle. This is contained in the statement of defence and can only be attributed to someone who saw the respondent behave in such a manner.

The contradiction is obvious from the evidence of the defendant's driver who said that, he noticed the respondent from the side mirror after the collision and that she was knocked by the side of the motor vehicle. If that be the case, then the respondent must have rammed herself onto the motor vehicle which is an unlikely scenario. There is no allegation that she was crossing the road, on the contrary she was walking on the side of the road when she was knocked down.

A pedestrian walking beside the road cannot be blamed for the accident where circumstances point to the fact that it is the motor vehicle that may have veered off the road. The respondent was not questioned on the distance which she gave of two meters off the road. Since proof is on a balance of probabilities, I find the truth lies with what she told the court.

For different reasons therefore, I arrive at the same conclusion that the defendant's driver was solely to blame for the accident. The respondent did not contribute thereto and no apportionment of liability can be attributed to her. The learned trial magistrate in his brief judgment did not state whether or not the defendant is vicariously liable for the negligence of its driver. That however, was not an issue and therefore the defendant is so held.

As a result of the accident, the plaintiff suffered a fracture of the humerous bone of the right upper arm, serious bruises on the right arm and pain, swelling and blood loss and soft tissue injuries. In the case of **Simon Taveta Vs Mercy Mutitu Njeru Civil Appeal No. 26 of 2013** the Court f Appeal at Nyeri relying on the case of **Kemfro Africa Limited T/A as Meru Express Service Gathogo Kanini Vs. A.M.M Lubia & Another (1982-88) 1. KAR 777** stated,

“the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court

of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or short of this the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage (see Ilango Vs. Mayoka)(1961) EA 705, 709- 713)”

Comparable damages should as far as possible in injury claims be compensated by comparable awards. The court should also always consider that high awards have a negative economic impact. That is not to say that litigants should not be adequately compensated.

I have looked at decided cases including Kisii High CCC No. 70 of 2000 (unreported) Philip Kipkorir Cheruiyot Vs Nebco (K) Limited and Lawrence Ayuba Simo. In that case the plaintiff sustained a fracture of right humerus mid shaft. The court awarded Kshs. 600,000/= general damages.

The defendant in the lower court cited some very old cases decided in 1993, 1989, 1991 and 1992. It is obvious that with the passage of time, the value of money has also been depreciated. Those decisions are no longer relevant today.

In the submission by the appellant, I note that the cases cited which include Nakuru HCCC No. 6 of 2010 Fast Choice Company Limited & Another Vs Hellen Mungari Ngure [2011 Ekler] where the respondent is said to have suffered a fracture of the right humerus middle one third, bruised right small finger and soft injuries of the chest and anterior wall, the court reduced an award of Kshs. 450,000/= to Kshs. 180,000/= as general damages.

In Nakuru HCCC No. 63 of 2010 Catherine Ngore Obare Vs. Stephen Mulatia Kula and 2 Other [2014] eKLR. The appellant suffered a fracture of the distal end of the humerus and soft tissue injuries of the right elbow. The court enhanced an award of Ksh. 50,000/= to Kshs. 180,000/= as general damages for pain, loss and suffering.

The learned trial magistrate relied on civil case No. 70 of 2000 and awarded Kshs. 650,000/= general damages. I have read that judgment which cited the doctors report as follows,

“Mr. Philip Kipkorir Cheruiyot has undergone a lot of pain and suffering since he was involved in this accident. The injuries he sustained have the following prognosis:

1.Fracture of the femoral head and dislocation of the right shoulder joint- as the femoral head was resected, the shoulder joint has been disrupted. This joint is permanently impaired.

2. The fracture of the right humerus in the mid shaft has united but there is tenderness at the fracture site.

3. Injury to the radial nerve has resulted into wasting of all muscles of his arm. Being a right handed person these injuries have highly incapacitated him. I classify the degree of injury as “grievous harm”. He should be awarded a permanent disability of thirty percent (30%).”

The injuries sustained by the respondent in this case cannot be said to compare with those stated in that judgment. In fact the latest medical report tendered on behalf of the respondent stated her permanent disability is 0 % and has fully recovered. Although she has a metal plate as at the time the report was prepared, the doctor recommended that it should not be removed as she stood the risk of damaging the radial nerve which would leave her with paralysis of wrist and fingers.

It is clear at this stage that the award made by the learned trial magistrate was on the higher side. That being the case, there is reason to disturb that award which I hereby do, and reduce the figure of 650,000/= to Kshs. 400,000/=. The special damages remain the same that is Kshs. 3650/=. To that extent only. This appeal is allowed.

The appellant shall be entitled to the costs of this appeal.

Dated, signed and delivered at Nairobi this 15th Day of June, 2016.

A. MBOGHOLI MSAGHA

JUDGE